have been damaged to a very small extent, and would not have been totally destroyed.

With regard to the duty of the master in the circumstances which arose, I agree with the principles laid down in *Notara's* case, and expressed in the passages read by your Lordship. It was said, however, in the course of the argument, and with truth, that the circumstances of that case were not the same as the present, the difference being that in *Notara's* case the injury to cargo happened in the course of the voyage, the circumstances there being that the vessel having put into a port for repairs, was in that port when the accident took place. It was held that in such circumstances it was the duty of the master to endeavour to diminish any loss resulting from the accident.

In this case the fact that the ship had finished its voyage makes no difference as to the master's duty in the circumstances, for the cargo was still in his custody, and so he was bound, as the Lord Ordinary puts it, "to do all in his power to minimise damage." Indeed, I did not understand that Mr Asher seriously controverted that, for he appeared to me to put his case not so much on the ground that there was no duty on the master to make the occurrence of the accident known to the merchant, but on this other ground, that even if the master had made the disclosure which it was said he ought to have made, the cargo would, by the time it could have been got out, have been as thoroughly damaged as it actually has been. That, he maintained, was proved.

Now, I do not say that that might not have been found a good defence if it was proved, but I am very clear that the *onus* of proving it lay on the shipowners. If, however, no damage resulted from the improper conduct of the master, no damages could be given to the shipper, but I think that the defence is unsuccessful in point of fact. I agree with your Lordship that we can merely speculate on what the consequences might or might not have been if the master had not failed in his duty. One can, however, imagine cases in which the defence might have been good. Suppose, as Mr Salvesen put it, that this had been a cargo of sugar. In that case it could have made no possible difference that the merchant had not been told of water having got into the hold till twelve hours after the event, but the present is not in the least a case of that sort. It is not made out, and indeed there is no evidence to show, that if due notice had been given to the shipper, and misrepresentations had not been made, the vessel could not have been unloaded in half or quarter the time which was actually taken, or, as the Lord Ordinary puts it, "in a few hours."

The defenders must therefore, I think, be held responsible for the condition of the cargo in so far as that condition was occasioned by the fault of the master.

LORD M'LAREN—As to the facts of this case, I agree with your Lordship that that part of the damage for which the Lord Ordinary has given decree is directly attributable to the positive misrepresentation of the master of the ship, made in the interests of his employers, communicated to them, and not disavowed by them. It therefore follows, in my opinion, that the owners should be responsible for the damage, which is the direct result of their own act. In saying so, I do not mean to suggest any doubt as to the soundness of the proposition that the mere concealment by the master of a ship from the consignee of facts material and necessary to enable the consignee to take instant measures for the saving of his cargo may not be a good ground for subjecting the shipowners in damages. On the contrary, I agree with all that is said by Mr Justice Wills and by your Lordship on that subject. The facts of the case have been very fully considered by your Lordship, and I have nothing to add to the review given of these facts, but only to express my entire concurrence in the proposed judgment.

LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuer — Guthrie — M'Lennan. Agents — Cumming & Duff, S.S.C.

Counsel for the Defenders—Asher, Q.C.—Salvesen. Agents — Boyd, Jameson, & Kelly, W.S.

Tuesday, November 28.

FIRST DIVISION.

GOVERNORS OF DOLLAR INSTITUTION, PETITIONERS.

Educational Endowments—Application to Court to Alter Scheme—Educational Endowments (Scotland) Act 1882 (45 *and* 46 *Vict. cap.* 59), *sec.* 20.

Section 20 of the Educational Endowments Act of 1882 enacts that in any scheme the Commissioners may provide for the alteration of the scheme by the Court of Session, upon application made, with consent of the Scotch Education Department, by the governing body or any party interested, provided that such alteration should not be contrary to anything contained in the Act.

The governors of an institution, under a scheme prepared by the Educational Endowments Commissioners, which contained a provision in terms of the section above quoted, petitioned the Court to amend the scheme by providing that pensions granted by the trustees who had preceded them in the management of the institution should be burdens on the trust, and that the governors should have power to grant retiring allowances to such teachers as had served the trust for a long time, and were old and infirm at the passing

of the scheme, and to compensate such teachers as had lost their appointments through the passing of the scheme. It was explained in the petition that though the amendment was framed in general terms, the petitioners only desired to dispose under it of three cases specified in the petition.

Held (*dub.* Lord M'Laren) that the 20th section of the Act only contemplated such alterations of a scheme as should have a general effect, and that the Court had no power to make an alteration of the kind proposed, and petition *refused*.

The Dollar Institution was held and administered (1st) under the will of John M'Nabb, dated 8th May 1800, and order and decree by the Lord Chancellor dated 22nd June 1818, by the minister and kirk-session of Dollar down to 22nd July 1847; and (2nd) under Act of Parliament 10th and 11th Victoria, cap. 16 (22nd July 1847), by a body of trustees, who managed the affairs of the Institution down to the 25th day of March 1887, at which date a Scheme prepared by the Commissioners under the Act 45 and 46 Victoria, cap. 59, entituled the Educational Endowments (Scotland) Act 1882, and approved of by Her Majesty the Queen by Order in Council on the said 25th March 1887, came into operation.

The minister and kirk-session, as trustees under the will, granted several pensions to teachers, and the trustees under the Act of Parliament 1847 (although no special provision or power was made or given for their so doing) also granted a pension to a teacher who was appointed to his situation prior to 1847, but to no teacher appointed by themselves until in the case of Miss Crombie, after mentioned.

By the 19th section of the Scheme the old trustees were empowered to continue to exercise all necessary acts of administration relative to the Endowment, and have all powers necessary therefor, until the first meeting of Governors held under the Scheme, and the trustees were, from and after that meeting, or at such time not exceeding six months therefrom as the Governors might appoint, wholly to cease from exercising any right or power of administration over the Endowment.

In accordance with section 18 of the Scheme, the first meeting of the Governors was held on 17th May 1887. The trustees held a meeting on the 4th July 1887 for the transaction of business. At this meeting of trustees it was by a majority resolved that Miss Crombie, for thirty-three years one of the teachers in the Institution, should receive a pension of £25 per annum on account of her long and faithful services. When the term arrived for payment to Miss Crombie of her pension the Governors paid it. At the audit of their accounts exception was taken to this payment, and it was disallowed by the auditor. On appeal, however, to the Scotch Education Department the payment was allowed, but the Governors were informed that they must furnish the Department with a legal opinion in favour of the course pursued before any future liabilities of the kind objected to were created.

At the next audit of accounts various items, including Miss Crombie's pension, were objected to. The Governors again appealed to the Education Department, who replied that before the question of remitting the disallowances (especially as regards the pension to Miss Crombie) could be disposed of they would require to have a legal opinion on the question. Opinion by counsel unfavourable to the Governors was furnished to the Department, who replied that "My Lords can only suggest that the Governors should, if persuaded of the necessity of such payments, consider whether it would be well to proceed under section 51 of the Scheme. But my Lords must of course reserve their own judgment in regard to any such proposal until it is before them."

Section 51 of the Scheme, adopting the provisions of section 20 of the Educational Endowments Act 1882, provided—"It shall be in the power of the Court of Session to alter the provisions of this Scheme upon application made to them with consent of the Scotch Education Department, by the governing body or any party interested, provided that such alteration shall not be contrary to anything contained in the Educational Endowments (Scotland) Act 1882."

The Governors accordingly presented a petition to the Court, in which, in addition to the facts already narrated, it was further set forth—"That the Governors have now obtained the consent of the said Education Department to this application, which consent is in the following terms:—'2*nd May* 1890.—Sir—Adverting to their Lordships' letter of the 11th ult., I am to inform you that my Lords are now prepared to give their consent to the governing body making an application to the Court of Session, in terms of section 51 of the Scheme, but only on the express understanding that such consent is given, not as implying any opinion on the subject of the application, but only in order that the question may be duly submitted to the judgment of the Court.'

"That two other cases have arisen, which have also been brought under the notice of the said Education Department, and which the Governors deem worthy of the consideration of your Lordships, involving, as they do, hardship to the teachers concerned.

"1. *The case of Mr Douglas.*—This is the case of a teacher who has been for thirty-nine years a faithful servant of the said Institution, and who has not resigned, but has been compelled from old age and ill-health to cease from active work. That in this case the Governors continued to pay to him his salary, and appointed another teacher to do his work, and that they are now continuing him on the staff at a reduced salary.

"2. *The case of Miss Snowdoune.*—This is the case of a teacher who has been for twenty-five five years in the service of the said Institution, being teacher in the Shear-

dale school, which belonged to and was under the administration of the said Dollar Institution trustees. That the said school was discontinued under and by virtue of the provisions specified in section 22 of the said Scheme, and the services of Miss Snowdoune were therefore dispensed with. That it has been proposed, with your Lordships' sanction, to give Miss Snowdoune out of the trust funds a sum equal to three years' salary in respect of her long and faithful services and the position in which she has unfortunately been placed owing to the operation of the said Scheme."

The petitioners accordingly craved the Court to amend the Scheme of the Educational Endowments Commission passed for the administration of the Dollar Institution "in order to make it applicable to the cases of Miss Crombie, Mr Douglas, and Miss Snowdoune, by adding at the end of section 24 of said Scheme the following clauses:—'Provided that such pensions as may have been granted by the trustees of Dollar Institution appointed by Act of Parliament 1847 (10 and 11 Vict. c. 16), are and shall continue to be a burden on the trust; provided also that the Governors shall have power to grant a retiring allowance to such teachers as had served the trust for a long period, and were found to be old and infirm at the passing of the Scheme; and provided also that the Governors shall have power to grant compensation to such teachers as may have lost their appointments through the passing of this Scheme."

It was further explained in the petition that while the proposed amendment was stated in general terms, the petitioners only desired authority to dispose under it of the three cases mentioned, and were not contending for the general principle of power to compensate or pension.

After intimation had been made in common form on the walls and in the minute-book, the Court on 18th October 1890 remitted to Mr George Gillespie, advocate, to inquire and report.

Mr Gillespie reported that the three cases specified in the petition were proper cases for pensions or allowances if the Governors had power to grant them, and that the Governors had at their disposal ample funds to meet the proposed payments, but said—"I hardly think that the present application is an application of the character which the Legislature expected to be made under that section. What seems to have been contemplated by that section was a permanent alteration in the scheme of management of the institution, or of the constitution of the governing body, which experience had been found to recommend. There is no such alteration sought here; all that is asked is that the Court shall grant special powers of a temporary nature for certain particular cases. Now, that being so, it is not to be expected that the proposal should be contrary to anything contained in the Act in the sense of being forbidden by any of its provisions. Had there been a provision proposed for giving the Governors a general power of awarding pensions in the future, that would have raised a general question of principle on which some instruction could be got from the Act, but there is no such proposal here."

At advising—

LORD PRESIDENT—We are asked in this petition to exercise the jurisdiction conferred upon us by section 20 of the Educational Endowments Act 1882, which provides that "In any scheme the Commissioners may provide for the alteration of the scheme by the Court of Session, upon application made, with consent of the Scotch Education Department, by the governing body or any party interested, provided that such alteration shall not be contrary to anything contained in the Act." Now, it appears to me that this is entirely a statutory jurisdiction, and that we cannot go beyond the letter of the statute which confers it.

The argument addressed to us was a good deal based upon considerations of equity, and considerations of the poverty and want of the persons on whose behalf the application is made. I am afraid that considerations of that kind are excluded by the clause to which I have referred.

The Scotch Education Department has given its consent to the petition being presented, but its consent is given in very cautious and reserved terms. They, in the first place, suggest that the Governors of the Dollar Institution, who are the petitioners here, should, if persuaded of the necessity of such payments, consider whether it would be well to proceed under section 51 of the Scheme, but reserve their own judgment as to any proposal which may be made when it is before them. On a subsequent occasion the Secretary to the Scotch Education Department writes thus — "Adverting to their Lordships' letter of the 11th ult., I am to inform you that my Lords are now prepared to give their consent to the governing body making an application to the Court of Session in terms of section 51 of the Scheme, but only on the express understanding that such consent is given, not as implying any opinion on the subject of the application, but only that the question may be duly submitted to the judgment of the Court." Section 51 of the Scheme merely adopts the provisions of section 20 of the Act which I have already cited—[*His Lordship then reviewed the circumstances in which the petition was presented, and explained the nature of the proposed amendments of the Scheme.*]

It is quite plain, I think, on the face of the petition, and the statements of the Governors, that the sole object of the petition is limited to enabling the Governors to deal with three particular cases, and that they desire to go no further. Now, it occurred to me at the hearing of the petition that such an application is not really comprehended under the 20th section of the Act, because the proposal is not for an alteration of the Scheme to have general effect, but only for an alteration for the purpose of enabling the Governors to pay the

money of the trust to particular individuals, which they have no power to do by the Scheme or in any other way.

We have had a suggestive and useful report by Mr Gillespie, and there is one passage of the report which I desire to notice — "I hardly think," the reporter says, "that the present application is an application of the character which the Legislature expected to be made under that section. What seems to have been contemplated by that section was a permanent alteration in the scheme of management of the institution or of the constitution of the governing body, which experience had been found to recommend. There is no such alteration sought here; all that is asked is that the Court shall grant special powers of a temporary nature for certain particular cases. Now, that being so, it is not to be expected that the proposal should be contrary to anything contained in the Act, in the sense of being forbidden by any of its provisions. Had there been a provision proposed for giving the Governors a general power of awarding pensions in the future, that would have raised a general question of principle, on which some instruction could be got from the Act, but there is no such proposal here."

I entirely adopt the suggestion of Mr Gillespie. I think that is not a case which can be entertained under the 20th section of the Act. If any application for the purpose of introducing into the Scheme a general power to make a pension fund be hereafter presented to us, that will be a fitting subject for consideration on its merits. Here the proposal is not of that kind, but is only an attempt under cover of the 20th section to enable the Governors to pay certain sums to particular individuals which otherwise they have no power to do.

LORD ADAM—So far as I can judge, the three persons mentioned in the petition are worthy of the pensions proposed, and if I thought we could do it I would be desirous of complying with the prayer of the petition, but I entirely agree with your Lordship that we cannot.

LORD M'LAREN—I have doubts about our powers in this matter, and prefer not to express an opinion, as I understand your Lordships are all of opinion that the petition cannot be granted.

LORD KINNEAR concurred.

The Court refused the petition.

Counsel for the Petitioners—Jameson—Cosens. Agents—Tait & Crichton, W.S.

Saturday, November 29.

FIRST DIVISION.

MILLAR, PETITIONER.

Public Company—Companies Act 1862, *sec.* 95—*Sanction of Court—Prosecution by Liquidator of Action Instituted in Company's Interest by Third Party before Winding-up.*

A holder of shares in a company who had alienated certain properties with the supposed object of defeating the diligence of the company against them for unpaid calls, was thereafter sequestrated. His trustee having obtained indemnity for expenses from the company, sued a reduction of the deeds of alienation. The defenders were assoilzied in the Outer House, and thereafter an order for the winding-up of the company was pronounced. The official liquidator was advised to reclaim against the judgments, and presented an application, under section 95 of the Companies Act 1862, for the sanction of the Court in prosecuting the reclaiming-notes. Application *granted.*

The petitioner was the official liquidator of the Property Investment Company of Scotland, Limited, under an appointment dated 13th August 1890, and he presented this petition to the Court for power under the Companies Acts 1862 to 1886, and particularly under the 95th section of the Act of 1862, to prosecute certain reclaiming-notes either in his own name or in the name of William Albert Davis, as trustee on the sequestrated estates of John Richardson; and in the latter case, to approve of his giving the said William Albert Davis a guarantee or indemnity for expenses incurred or to be incurred of certain actions to which the reclaiming-notes related, or in such other form as the Court might direct.

John Richardson was a registered holder of certain shares in the Property Investment Company, upon which shares calls had been made but without payment, and in the year 1888 the company obtained decree against John Richardson for payment of £660 in respect of said unpaid calls. Upon this decree a charge was made, and thereafter upon 24th April 1889 the company sequestrated John Richardson, and William Albert Davis was appointed trustee in the sequestration. Besides the claim of the Property Investment Company in respect of said calls, the only other claims lodged in the sequestration were two in number, which taken together were considerably less than that of the company. The whole estate recovered by the trustee was insufficient to meet the expenses of the sequestration, and there was no further estate which could be recovered under the sequestration unless the trustee was successful in setting aside certain alienations of property granted by John Richardson between